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In the Supreme Court of the United States

STATE OF NEW HAMPSHIRE, PLAINTIFF

v.

STATE OF MAINE

ON MOTION TO DISMISS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the doctrine of res judicata bars the State of New Hampshire's claim that its boundary with the State of Maine in Portsmouth Harbor extends to the low water mark of the Maine shore.

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

The State of New Hampshire brought this original action against the State of Maine to obtain a determination of the boundary between the two States in the inner portion of Portsmouth Harbor. See N.H. Br. in Support of Mot. for Leave to File Compl. 1. New Hampshire asserts that its boundary in that vicinity, at the mouth of the Piscataqua River, extends to the low water mark of the Maine shore. *Ibid.*; see *id.* at 33-34 (Compl. ¶¶ 1-3). Maine contends, based on a 1740 colonial decision of the King in Council and this Court's decision and decree in *New Hampshire* v. *Maine*, 426 U.S. 363 (1976), 434 U.S. 1 (1977), that the boundary has already been definitively set at the middle of the Piscataqua River, rather than at the Maine shore. See Me. Br. in Opp. 16, 20-26. The Court has granted New Hampshire leave to

file its complaint and Maine leave to file a motion to dismiss on *res judicata* grounds.[1]

1. New Hampshire's claim implicates historical events from the colonial era that, although complex in their details, are generally familiar. In 1620, King James I issued the "Great Patent of New England" to an English merchant company styled as the Council of New England. In 1622, the Council of New England granted lands between the Merrimac and Kennebec Rivers to Sir Ferdinando Gorges and Captain John Mason. See Report of Special Master Clark in *New Hampshire* v. *Maine*, No. 64, Original, at 8-15 (1975) [hereinafter *Clark Report*].[2]

In 1629, Gorges and Mason divided the grant between themselves at the Piscataqua River. Gorges' northeastern portion became known as the Province of Maine, while Mason's southwestern portion became part of the Province of New Hampshire. Over time, the rapidly expanding Province of Massachusetts Bay attempted to assume control over both areas. By the end of the seventeenth century, the Province of Massachusetts Bay had received a new royal charter that subsumed the Province of Maine. New Hamp-

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[1] New Hampshire's claim has practical importance because it encompasses the islands that constitute the Portsmouth Naval Shipyard, a United States Navy facility that is located on a number of small islands that have been connected by fill. The site is generally known as Seavey's Island, the name of the largest of the connected islands. The United States Department of the Navy has no preference with regard to whether Seavey's Island is in New Hampshire or Maine.

[2] This Court's decision in *New Hampshire* v. *Maine* involved a dispute over the States' lateral marine boundary in the vicinity of interest here. See pp. 6-9, *infra*. Special Master Clark's Report in that case—which Maine has reproduced in its separately bound two-volume supplemental appendix, Me. Mot. to Dismiss App. 347a-407a—collects relevant historical sources and describes the pertinent events in rich detail. See also Michael W. Reed et al., *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987*, at 983-1047 (1991) (reprinting report).

shire, however, had established tenuous autonomy as a separate royal province. See *Clark Report* 15-22; see also Henry Gannett, *Boundaries of the United States* 40-41, 47-48 (3d ed. 1904) (Gannett) (H.R. Doc. No. 678, 58th Cong., 2d Sess. (1904)).

In the early 1700s, the Province of New Hampshire disputed the location of its boundaries with the Province of Massachusetts Bay, including both New Hampshire's southern boundary along the Merrimac River and the northern boundary separating New Hampshire from Maine. When the provinces were unable to reach agreement, New Hampshire presented the dispute to King George II for resolution by the "King in Council." See Joseph Smith, *Appeals to the Privy Council from the American Plantations* 442-449 (1965) (Smith).[3] The King ultimately referred the matter, through his Privy Council, to the Board of Trade, which recommended that commissioners be drawn from the

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[3] In theory, the King himself resolved conflicts arising from royal charters and grants as a matter of sovereign prerogative upon the advice of ministers comprising his Privy Council. See, *e.g.*, Hannis Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States* 82-83 (1905) (Taylor); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 692-693 & n.29 (1925). In practice, the Privy Council, which typically numbered from 30 to 40 members and operated through a committee system, came to exercise broad authority over territorial disputes. See *id.* at 693 n.29; Smith 25. An aggrieved colony typically sought relief through a petition to the "King in Council." The King, through the Privy Council, typically referred the matter to the Council's Committee for Hearing Appeals from the Plantations. That Committee would in turn refer the matter to the Lord Commissioners for Trade and Plantations, a body that ultimately evolved into the Board of Trade. The Board of Trade nominated royal commissioners who collected evidence and reported their findings to the Committee for Hearing Appeals. The Committee "passed upon the recommendations of the commissioners, and its conclusions were, as a matter of course and in the form of a decree, approved by the King in Council." 1 James Brown Scott, *Judicial Settlement of Controversies Between States of the American Union* 573 n.1 (1918) (Scott); *Clark Report* 23 n.48; see generally Smith 71-73, 121- 122, 417-463.

provincial councils of other colonies to resolve the matter. See *id.* at 444-445. In 1737, the King, through the Privy Council, appointed commissioners from the other colonies to determine the boundary and provided for appeal to the King in Council. See *id.* at 445-446. See also *Clark Report* 21-23.[4]

The commissioners took evidence, heard argument, and issued their report. With respect to the northern boundary, the report described the commissioners' resolution of the boundary dispute in the vicinity of Portsmouth Harbor (then known as Piscataqua Harbour) and the Piscataqua River as well as the Isles of Shoals, which are located offshore and to the southeast of the harbor. Specifically, as to those locations, the report stated, in relevant part, that

> the Court Resolve & Determine that the Dividing Line Shall pass up thro' the mouth of Piscataqua Harbour & up the Middle of the River into y^e^ River of Newichwannock (part of which is now called Salmon Falls) & thro' the Middle of the Same to the furthest head thereof * * * and that the Dividing line shall part the Isles of Shoals & run thro' the Middle of the Harbour between the islands to the sea on the Southerly side & that the Southwesterly part of the Said Islands Shall lye in & be Accounted part of the Prov. Of New Hamp^r^ & that y^e^ North Easterly part thereof shall lie in & be Accounted part of the Prov. Of the Mass^a^ Bay.

Me. Mot. to Dismiss App. 7a (Royal Commissioners Report (1737)). See also *Clark Report* 23-28.

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[4] The document authorizing and appointing the commissioners stated:

> Either of S^d^ Provinces who shall find themselves aggrieved, may Enter their Appeal to us in Our Privy Council with a declaration what parts of the Determination of you the said Commissioners they abide by or appeal from.

Me. Mot. to Dismiss App. 5a. The determination of the King in Council "was to be final and conclusive for all parties." Smith 446 (citing 19 N.H. State Papers 268-272).

Both New Hampshire and Massachusetts appealed to the Privy Council from the commissioners' determination of the boundaries. Their appeals focused on a number of issues, including the location of the boundary in Portsmouth Harbor and the Piscataqua River. See Smith 446-447. New Hampshire specifically took exception "against that part of the Judgm[t] that Says: 'Through the Mouth of Piscataqua Harbour and up the Midle of the River' Because we humbly conceive that m[r] Gorges Patent, By which the Mass[a] Claime doth not convey any Right to the River." See Me. Mot. to Dismiss App. 9a (N.H. Exceptions (1737)); see also *id.* at 10a-11a (Pet. of Appeal to the King); *id.* at 13a-15a (N.H. Br. to Privy Council). Massachusetts disputed that contention, stating, *inter alia*, that "[b]y the express Words of *Gorges's* Grant, the Line must run thro' the Mouth of *Piscataqua*, and up the Middle of the River, it being impossible to run the Line agreeable to the Description of that Grant, without." *Id.* at 17a (Mass. Br. to Privy Council). See generally *Clark Report* 28-30.

After deliberating for more than a year, the Privy Council's Committee for Hearing Appeals from the Plantations issued an order that explicitly resolved boundary questions not at issue here and "further Ordered that the rest of the Commiss[rs] Report or Determination be Affirmed." Me. Mot. to Dismiss App. 19a (Order of Privy Council (1739)). On April 9, 1740, the King issued an order that recited the "Commissioners Judgement of Provinces bounds"—specifically including their determination that "the dividing line shall pass up thrô the mouth of Piscataqua Harbor and up the middle of the River"—and, upon "the advice of his Privy Council," accepted the Committee's decision. *Id.* at 20a, 21a, 22a (King's Decision on Boundary Line Question). Like the Committee's order, the order of the King in Council proceeded "to approve, and to declare, adjudge & order" a specific resolution of boundary questions not at issue in this

litigation and "to affirm the rest of the Commissioners said Report or Determination." *Id.* at 21a-22a. The order directed Massachusetts and New Hampshire "to take especial care that his Majesty's Commands in this behalf are Executed in the most effectual and expeditious manner" and further directed the New Hampshire Council to enter the order "in the Council Book thereof." *Id.* at 22a. See *Clark Report* 30.

2. New Hampshire invoked this Court's original jurisdiction, 233 years later, to resolve the location of its lateral marine boundary with Maine in the vicinity of Portsmouth Harbor. See *New Hampshire* v. *Maine*, 414 U.S. 810 (1973); see also Michael W. Reed, *Shore and Sea Boundaries* 168-171 (2000) (Reed) (describing the litigation, physical features, and delimitation principles). The Court referred the dispute to the Special Master, retired Justice Tom C. Clark, 414 U.S. 996 (1973).

After the referral, the States proposed to settle the dispute through a consent decree entered upon a stipulated record. In their proposed consent decree, as throughout the litigation, the two States agreed that the 1740 order fixed the boundary at "the Middle of the River." See *New Hampshire* v. *Maine*, 434 U.S. at 1-2. The proposed consent decree interpreted that term to mean the main navigational channel of the Piscataqua River. See *id.* at 2; *Clark Report* 36, 53, 54-55; see also 426 U.S. at 370-371 (White, J., dissenting). Master Clark requested briefing and prepared the detailed report cited in the foregoing section. He recommended that the Court reject the States' proposed consent decree "because it constitutes 'mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Article III functions.'" *Clark Report* 3 (quoting *Vermont* v. *New York*, 417 U.S. 270, 277 (1974) (per curiam)). He proposed, instead, that the Court resolve the issue based on the stipulated

record, and he recommended a boundary line on that basis. *Id.* at 4-5. Master Clark agreed with the two states that the boundary was fixed by the 1740 order, but, based on this Court's decisions and the historical context of the 1740 order, he interpreted "Middle of the River" to mean the "geographic Middle" of the River. *Id.* at 41; see also 426 U.S. at 371 (White, J., dissenting).

Master Clark first described the origins of the lateral marine boundary dispute, which arose out of the competing claims of New Hampshire and Maine to regulate the taking of lobsters in offshore marine waters. *Clark Report* 5-8. He next recounted the history of the King's 1740 order, which we have described above. See *id.* at 8-32. Master Clark characterized the historical consequences of the King's order:

> This boundary decreed by the King during the provincial period remained the same when Massachusetts and New Hampshire helped to form the Union and, later, when Maine was formally separated from Massachusetts in 1819 and admitted to the Union. Unlike the congressional enabling acts for other States subsequently admitted to the Union, neither the acts of ratification of the Articles of Confederation or the Constitution passed by Massachusetts and New Hampshire, nor the congressional act admitting Maine in 1820 specifically defined the boundaries of these States, and the States entered the Union with boundaries fixed as of that date. For all intents and purposes, the decree of 1740 fixed the boundary in the Piscataqua Harbor area, and nothing has been done by the legislatures of those States to alter these territorial limits.

Id. at 31-32 (footnotes omitted). Master Clark concluded that the lateral marine boundary dispute could be resolved by "the proper interpretation of that decree's language." *Id.* at 32. He evaluated critical terms of the King's 1740 order,

id. at 32-49, including the phrase "Middle of the River," *id.* at 36-43, and then employed his interpretation of those terms to determine the lateral marine boundary, *id.* at 49-59. He recommended that the Court accept that boundary, rather than the boundary that the States had put forward in their proposed consent decree. *Id.* at 59.

This Court sustained Maine's exception to the Master's rejection of the proposed consent decree. *New Hampshire* v. *Maine*, 426 U.S. at 366. The Court did not question the Master's recitation of the historical record, including his conclusion that the King's 1740 order "permanently fixed the Maine-New Hampshire boundary." *Id.* at 367. The Court noted:

> The States expressly agree with the conclusion of the Special Master that "the decree of 1740 fixed the boundary in the Piscataqua Harbor area."

Id. at 367 (quoting *Clark Report* 32). The Court reasoned that "the proposed consent decree does nothing except record the States' agreement upon the location of the 'Mouth of the Piscataqua River,' 'Middle of the River,' and 'Middle of the Harbour' within the contemplation of the 1740 decree." *Id.* at 368. "The consent decree therefore proposes a wholly permissible final resolution of the controversy both as to facts and law." *Id.* at 368-369.

The Court also noted that the proposed consent decree "plainly falls without the Compact Clause," stating:

> New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating precisely this already existing boundary.

426 U.S. at 370. The Court accordingly entered the States' proposed consent decree. See 434 U.S. 1. That decree recites the pertinent language of the 1740 order, *id.* at 1-2,

and states, among other things, that the term "'Middle of the River' * * * as used in the [1740] Order, mean[s] the middle of the main channel of navigation of the Piscataqua River." *Id* at 2. Based on that specification, the consent decree fixes one end of the lateral marine boundary between the two States at the point where that main channel of navigation terminates at the mouth of the river, and then runs the boundary from that point to the navigation channel in Gosport Harbor in the Isle of Shoals. *Id.* at 2, 3.

3. Notwithstanding the foregoing events, New Hampshire now alleges that its boundary, within Portsmouth Harbor and in the vicinity of the mouth of the Piscataqua River, extends to the low water mark of the Maine shore. N.H. Br. in Support of Mot. for Leave to File Compl. 1, 33-34. Maine has moved to dismiss the complaint on the ground that New Hampshire's claim is barred, under principles of res judicata, by the King's 1740 order and this Court's decision and decree in *New Hampshire* v. *Maine*, *supra*. See Me. Mot. to Dismiss 20-30.

ARGUMENT

THE DOCTRINE OF RES JUDICATA BARS NEW HAMPSHIRE'S CLAIM

The doctrine of res judicata precludes New Hampshire from claiming that the New Hampshire-Maine boundary lies at the low water mark of the Maine shore. King George II's 1740 order fixed the boundary between New Hampshire and Massachusetts "thrô the Mouth of Piscataqua Harbour and up the Middle of the River." See *New Hampshire* v. *Maine*, 434 U.S. 1, 1-2 (1977); Me. Mot. to Dismiss App. 3a, 21a-22a. When Maine was formally separated from Massachusetts and admitted to the Union, Maine succeeded to Massachusetts' boundary with New Hampshire. And when New Hampshire and Maine disputed their lateral marine boundary in that vicinity, this Court directed entry of a consent

decree that gave recognition to the King's 1740 order. See *New Hampshire* v. *Maine*, 426 U.S. 363 (1976); 434 U.S. at 1-4 (decree). New Hampshire and Maine are consequently bound by the text of the 1740 order, which sets the boundary at the "Middle of the River." Under principles of res judicata, New Hampshire may no longer make claim to a boundary on Maine's shore. The Court should accordingly dismiss New Hampshire's complaint.

A. King George II's 1740 Order Conclusively Established The New Hampshire-Massachusetts Colonial Boundary At The "Middle Of The River"

During the colonial era, "the King-in-Council had authority to fix the boundary between the two royal provinces." *Vermont* v. *New Hampshire*, 289 U.S. 593, 600 (1933); see, *e.g.*, *Virginia* v. *West Virginia*, 246 U.S. 565, 597-598 (1918). The King possessed that authority by virtue of sovereign prerogative. *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 739 (1838). As this Court explained:

> The king had no jurisdiction over boundary within the realm, without he had it in all his dominions, as the absolute owner of the territory, from whom all title and power must flow, as the supreme legislator; save a limited power in parliament. He could make and unmake boundaries in any part of his dominions, except in proprietary provinces.

Ibid. (citations omitted). See also *id.* at 742-743; Taylor 82-83.[5]

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[5] The English courts recognized a distinction between the King's role in determining disputes among the royal provinces respecting their boundaries in the first instance and the courts' role in resolving disputes growing out of agreements between individual proprietors. See *Penn* v. *Lord Baltimore*, 27 Eng. Rep. 1132 (1750) (providing for specific performance of an agreement between William Penn and Lord Baltimore to resolve a dispute over the boundaries of their proprietary grants); see also Joseph Story, *Commentaries on the Constitution of the United States*

When the Colonies declared their independence and became States, each asserted sovereignty within the territorial limits of what it perceived to be its boundaries, relying on the royal charters and patents that had defined the colonial bounds. This Court accordingly looked to those sources to resolve interstate boundary disputes. See, *e.g.*, *Rhode Island* v. *Massachusetts*, 45 U.S. (4 How.) 591 (1846); *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) at 743-748; see also *Harcourt* v. *Gaillard*, 25 U.S. (12 Wheat.) 523 (1827).[6] This Court likewise recognized the rulings of the King in Council, during the colonial period, as valid determinations of disputed boundaries. See, *e.g.*, *Rhode Island* v. *Massachusetts*, 45 U.S. (4 How.) at 634, 636 (citing previous decisions of the King in Council).[7]

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§§ 81-83 (Rotunda & Nowak eds. 1987) (discussing distinctions between provincial, proprietary, and charter governments). This Court has recognized that distinction as well. See *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) at 739 ("In council, the king had no original judicial power. * * * In virtue of his prerogative, where there was no agreement, the king acts not as a judge, but as the sovereign acting by the advice of his council, the members whereof do not and cannot sit as judges.") (citation omitted); *id.* at 740, 742, 743 (suggesting that, because Penn sought specific performance of a negotiated agreement, the dispute could be resolved "in 'judicature according to the law'"); see also Frankfurter & Landis, *supra*, 34 Yale L.J. at 692-693 n.29.

[6] See also, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767, 771-772 (1998) (tracing New Jersey's boundary dispute with New York to King Charles II's grant to the Duke of York); see generally Gannett 39-104 (describing the origins of the boundaries of the 13 original Colonies).

[7] For example, Rhode Island's northern boundary was ultimately determined by this Court in *Rhode Island* v. *Massachusetts*, 45 U.S. (4 How.) 591 (1846). But Rhode Island's western boundary was established by the King in Council's decision in *Rhode Island* v. *Connecticut*, 3 Acts of the Privy Council, Colonial Series 10 (1727), and its eastern boundary was determined by the King in Council's decision in *Rhode Island* v. *Massachusetts*, 3 Acts of the Privy Council, Colonial Series 436 (1746). See Gannett 55-65, 71-72; Scott 577 n.2. This Court has characterized decisions of the King in Council as exercises of the sovereign's colonial prerogative rather than as judicial judgments. See *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) at 739-740, 742, 743. The King in Council, the Privy Council,

In accordance with those historical practices and understandings, the King's 1740 order respecting the colonial boundary between New Hampshire and Massachusetts was a final and conclusive determination of that boundary in the area of Portsmouth Harbor and the Piscataqua River. The King in Council had power to determine that boundary, and his affirmation of the commissioners' judgment that the boundary lies "thrô the mouth of Piscataqua Harbor and up the Middle of the River" definitively resolved the boundary dispute. Indeed, this Court, in *Rhode Island* v. *Massachusetts*, cited the 1740 order as an example of the King's exercise of his power to determine boundaries by "order in council." 37 U.S. (12 Pet.) at 739; see also *id.* at 688 (argument of counsel cited by the Court).

New Hampshire argues, unpersuasively, that the King's 1740 order did not establish the New Hampshire-Massachusetts colonial boundary in the vicinity of Portsmouth Harbor and the Piscataqua River. New Hampshire contends (Br. in Opp. 2-3) that the New Hampshire-Massachusetts boundary in that area was not in dispute in the proceedings before the Boundary Commission and the Privy Council. The proceedings documented in Maine's motion establish, however, that New Hampshire disputed Massachusetts' boundary claim in that vicinity.[8] New Hampshire also mistakenly suggests (*id.*

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and the Boundary Commissioners used judicial terminology in describing their actions, see Me. Mot. to Dismiss App. 19a-23a, and the proceedings "bore the characteristics of a litigation," Frankfurter & Landis, *supra*, 34 Yale L.J. at 693. This Court has stated, however, that, in those circumstances, "the king act[ed] not as a judge but as the sovereign acting by the advice of his council." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) at 739; Taylor 83.

[8] See, *e.g.*, Me. Mot. to Dismiss App. 1a (New Hampshire's petition requesting that the King "explain[] the New Charter granted to Massachusetts, which in that respect has directed the Bounds to begin at the entrance of Piscateque Harbour and so to pass up the same into the River of Newichwannick"); *id* at 3a-4a (King's direction to Boundary Commissioners to determine "the Respective boundaries of Our said provinces

at 3-4) that the King in Council did not decide that dispute. The Report of the Boundary Commissioners expressly addressed the question, and the King, on advice of his Privy Council, affirmed their determination.[9] New Hampshire additionally asserts that the King in Council lacked intent (*id.* at 4-6) or authority (*id.* at 7- 12) to draw a boundary that would divide a port. Those assertions, however, are inconsistent with the express terms of the King's order and the broad scope of the King's sovereign prerogatives.[10] Rather, the King's exercise of his sovereign prerogative power conclusively established the territorial limits of the Province

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of the Mass[a] Bay & New Hamp[r]" based on the parties' statements of "where and in what places the boundarys on the Southern and Northern Part of New Hampsh[r] ought to begin"); *id.* at 7a (Boundary Commissioners' Report explicitly determining the "Northern Boundary"); *id.* at 9a (New Hampshire's exceptions); *id.* at 10a (New Hampshire's appeal to the King in Council); *id.* at 13a (New Hampshire's brief to the Privy Council); *id.* at 16a (Massachusetts' brief to the Privy Council).

[9] The Boundary Commissioners' Report states that "the Court Resolve & Determine that the Dividing Line Shall pass thro' the mouth of Piscataqua Harbour & up the Middle of the River." Me. Mot. to Dismiss App. 7a. The King's order repeated that statement, *id.* at 20a-21a, and, after rejecting a determination of the Commissioners that is not at issue here, stated the King's decision, upon "the advice of his Privy Council," to "affirm the rest of the Commissioners said Report or Determination," *id.* at 22a. The King thereafter relied on the prescribed "Dividing Line" in setting out the geographical reach of the powers of New Hampshire's Provincial Governor. See, *e.g.*, *id.* at 26a-27a, 32a-33a (King's 1741 and 1761 Commissions to Governor Wentworth describing the boundaries of New Hampshire).

[10] The King affirmed the Boundary Commissioners' determination that "the Dividing Line shall pass up thrô the mouth of Piscataqua Harbour and up the Middle of the River"—a line that, by its plain terms, necessarily bisected the Harbor. New Hampshire provides no authority for the implausible proposition that the King's power to decree boundaries was circumscribed by the powers of his subordinate ministers within the Crown's "Treasury." Compare N.H. Br. in Opp. 7-10, with *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) at 739-743.

of New Hampshire in the area now known as Portsmouth Harbor.[11]

B. This Court's Decision In *New Hampshire* v. *Maine* Determined That The King's 1740 Order Establishes The Current Boundary Between Those States

Much has transpired since 1740. The Colonies declared their independence, the new States formed a Union under the Constitution, and the State of Maine came into being, occupying the lands that were previously part of the State of Massachusetts. Maine urges, based on the historical record, that its boundary with New Hampshire remains defined by the King's 1740 order at the "Middle of the River" (Me. Mot. to Dismiss 8-15) while New Hampshire contends that, even if the King's 1740 order once controlled, subsequent events now place that boundary at Maine's shore (N.H. Br. in Opp. 12-19). Like Master Clark, we believe that Maine's view of the historical record is the correct one. See p. 7, *supra*; *Clark Report* 31-32. But the Court need not resolve the States' competing views of history. Under the doctrine of res judicata, coupled with this Court's decision in *New Hampshire* v. *Maine*, the Court may dismiss New Hampshire's

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[11] New Hampshire notes (Br. in Opp. 10-12) that the decisions of the King in Council would not qualify—at least from a "separation of powers" perspective—as judicial judgments. See note 7, *supra*. New Hampshire goes on to argue that the King's 1740 order is therefore not entitled to res judicata effect. New Hampshire's conclusion, however, does not necessarily follow. See, *e.g.*, *University of Tenn.* v. *Elliot*, 478 U.S. 788 (1986) (noting that administrative rulings may be given res judicata effect). But in any event, and regardless of how one characterizes the nature of the King's decisions for separation-of-powers purposes, the King's 1740 order conclusively determined the rights of the colonies during the colonial period, and it definitively settled the colonial boundary at that time. As we explain below, res judicata principles come into play because this Court entered a decree in *New Hampshire* v. *Maine* that recognized the King's 1740 order as establishing the current interstate boundary at issue in this case. See pp. 14-20, *infra*.

complaint without the need for further development of the factual record.

The doctrine of res judicata embraces the principle of "issue preclusion," which generally provides:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27, at 250 (1982). That general principle has limited application to consent decrees. "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." *Id.* § 27 cmt. e, at 257. As a result, a consent judgment normally does not result in issue preclusion. *Ibid.* "The judgment may be conclusive, however, with respect to one or more issues, *if the parties have entered an agreement manifesting such an intention.*" *Ibid.* (emphasis added). Accordingly, the question whether a consent decree results in issue preclusion turns on the terms of the decree.

This Court followed that approach in *Arizona* v. *California*, 120 S. Ct. 2304 (2000). The relevant issue in that case was whether a lower court consent judgment resolving an Indian Tribe's monetary claim against the United States, which was ambiguous as between mutually exclusive theories of recovery, barred the Tribe from later seeking water rights that would be available under one theory but not the other. See *id.* at 2318-2321. Applying the general principle set forth above, the Court concluded that the consent judgment "is too opaque to serve as a foundation for issue preclusion." *Id.* at 2320. In reaching that conclusion, the Court cited the general principle set out in Section 27 of the Restatement, *id.* at 2319, and expressly acknowledged the exception, stating:

> [S]ettlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect.

Ibid. This Court made the same point in *United States* v. *International Building Co.*, 345 U.S. 502 (1953):

> A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

Id. at 506. *Arizona* v. *California* and *International Building Company* illustrate the general rule that consent decrees normally do not result in issue preclusion. This case, by contrast, illustrates the exception to that rule.

In *New Hampshire* v. *Maine*, the Court entered a decree that, by its express terms, recognized the King's 1740 order and interpreted key phrases of that royal directive. 434 U.S. at 1-2. The Court's decree recites the King's order and then states:

> The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order, mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

Id. at 2. The Court's decree clearly manifests the States' formal agreement and the Court's determination that the King's 1740 order establishes their current boundary in the area of Portsmouth Harbor and the Piscataqua River. The States, by consenting to that decree, explicitly acknowledged that the King's order provided the controlling law for setting their boundary, and they expressed their understanding of the meaning of certain terms within that order. The decree

accordingly precludes either State from now claiming that the King's order does not provide the controlling law for establishing a continuation of their boundary landward of the lateral marine boundary. See *Arizona*, 120 S. Ct. at 2319; *International Bldg. Co.*, 345 U.S. at 506.[12]

This Court's decision directing entry of the consent decree, 426 U.S. 363, confirms the States' joint understanding of the King's 1740 order as establishing the existing boundary between the two States in Portsmouth Harbor. The Court rejected concerns, initially voiced by the Master and later repeated by New Hampshire, that entry of the proposed consent decree would exceed this Court's Article III powers or violate the Compact Clause. See *id.* at 365-366. The Court noted that "[t]he States expressly agree with the conclusion of the Special Master that 'the decree of 1740 fixed the boundary in the Piscataqua Harbor area.'" *Id.* at 367. The Court held that entry of the decree was an appropriate exercise of its Article III powers precisely because "the 1740 decree, not the proposed consent decree, permanently fixed the boundary between the States; the proposed consent decree does nothing except record the States' agreement upon the location of the 'Mouth of the Piscataqua River,' 'Middle of the River,' and 'Middle of the Harbour' within the contemplation of the 1740 decree." *Id.* at 368. The Court concluded, for the same reason, that the proposed consent decree did not require congressional approval under the Compact Clause, explaining:

> New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating precisely this already existing boundary.

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[12] Neither New Hampshire nor Maine suggests that any events since 1977—when the Court entered its decree—have effected a change in that law.

Id. at 370. Hence, this Court concluded, before it entered the consent decree, that the decree manifested the States' acceptance of the King's 1740 order as establishing the controlling law for determining their "true and ancient boundary" in the area of Portsmouth Harbor and the Piscataqua River. *Ibid.* (quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 522 (1893)). See Reed 169.[13]

This result also accords with common sense. The States had no reason to rely on—and quote at length from—the King's 1740 order in determining their lateral marine boundary unless they accepted that order as stating the controlling law for determining their boundary. Furthermore, they could not plausibly have intended that the King's 1740 order would set out the controlling law for the lateral marine boundary, but *not* for the continuation of that boundary landward "thrô the Mouth of the Piscataqua Harbour and up the Middle of the River." To the contrary, the only reasonable interpretation of the Court's decree is that it defines

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[13] New Hampshire's assertion of a particular legal position in a prior judicial proceeding would not, standing alone, prevent New Hampshire from taking a different position in this case. Sovereigns engaged in litigation must frequently refine or change their legal positions over time in response to changes in the law or their understanding of the controlling legal principles. We are not aware of any instance in which this Court has endorsed general application of "judicial estoppel" against the federal or state government. See *Illinois* v. *Campbell*, 329 U.S. 362, 369 (1946) (noting that "[a]lthough ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states," a State may be subject to that doctrine when it acts as a lien creditor in an insolvency proceeding). This case, however, involves far more. New Hampshire and Maine entered into a consent decree that expressed their joint understanding of the legal principles that would govern boundary disputes in Portsmouth Harbor. This Court not only approved entry of the decree based on that understanding, but also concluded, in establishing its own jurisdiction to approve entry of the 1976 decree, that the 1740 order established the current boundary. This case accordingly presents a question of issue preclusion rather than judicial estoppel.

the "Middle of the River" for all purposes to ensure that the interstate boundary consists of a continuous line. If "Middle of the River" were to have one meaning for the inner harbor boundary and another for the lateral marine boundary, the resulting boundary between New Hampshire and Maine would be a series of discontinuous lines—an odd result indeed.

In sum, this Court's decree in *New Hampshire* v. *Maine* did more than merely resolve New Hampshire's claim respecting the location of its lateral marine boundary with Maine. That decree also resolved the specific issue of the continuing applicability of the King's 1740 order in establishing the States' boundary in the area of Portsmouth Harbor and the Piscataqua River. See 434 U.S. at 1-2 (¶ 3). It also expressly resolved, for purposes of the 1740 order, the meaning of the term "Middle of the River" for purposes of the King's order. *Id.* at 2 (¶ 4). There was nothing "ambiguous" or "opaque" about the Court's decree on these points. Compare *Arizona* v. *California*, 120 S. Ct. at 2320. The agreement of the parties was unquestionably "based on the merits" of the boundary issues in the vicinity of the mouth of the Piscataqua River, and not on "some collateral consideration" that might have led the States to compromise a particular dispute while leaving final resolution of the underlying issues for another day. See *id.* at 2329 (quoting *International Bldg. Co.*, 345 U.S. at 505). Moreover, resolution of those matters was essential to the decree, because their resolution served to locate one terminus of the lateral marine boundary, which begins at the "the Middle of the River" (defined under the decree to mean its main channel of navigation) at "the Mouth of the Piscataqua River," and then extends seaward to the main channel of navigation in Gosport Harbor in the Isles of Shoals. See 434 U.S. at 2-3 (¶¶ 6, 8 and 9).

Because the Court's resolution of those issues was clear and essential to its decree, New Hampshire is precluded from relitigating them and, in particular, from now claiming that its boundary with Maine along the Piscataqua River is at the low water mark on the Maine shore. A decree of this Court adjudicating the boundary between two States is intended to constitute a permanent determination on which the respective States and numerous private parties may rely. Where, as here, the Court's decree also expressly sets forth the Court's determination of underlying issues of law and fact on which the decree itself is predicated and which the Court and the parties therefore found necessary to address, the decree must be understood, absent a strong showing to the contrary, to constitute a definitive resolution—and to bar relitigation—of those issues as well. New Hampshire has made no contrary showing here.[14]

CONCLUSION

The motion to dismiss should be granted.

Respectfully submitted.

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[14] New Hampshire may bring suit to obtain a determination of the exact location of "Middle of the River," using the definition contained in the consent decree, 434 U.S. at 2, for points landward of the lateral marine boundary. Any such suit would be limited, however, to determining the location of the "middle of the main channel of navigation of the Piscataqua River." *Ibid.* Whatever the location of the "Middle of the River," however, it cannot possibly be at the low-water mark on Maine's shore.

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DECEMBER 2000

APPENDIX

[434 U.S. 1 (1977)]

Supreme Court of the United States

NEW HAMPSHIRE

v.

MAINE

[Filed: Oct. 3, 1977]

ON JOINT MOTION FOR ENTRY OF FINAL DECREE

DECREE

The joint motion for entry of a final decree is granted.

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Report of the Special Master is hereby approved, and the motion for entry of judgment by consent of plaintiff and defendant is granted.

2. This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor in the Isles of Shoals.

3. The Order of the King in Council of April 9, 1740, in pertinent part, provided:

> "And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with his Majestys other Governments And That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same . . . ."

4. The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order, mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

5. The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point, New Hampshire, and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cove, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

6. The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43°02'42.5" North and longitude 70°42'06" West. Said point has computed bearing of 194°44'47.47" true and a computed distance of 1,554.45 metres (1,700 yards) from the Whaleback Lighthouse, No. 19, USCG-158, whose position is latitude 43°03'31.213" North and longitude 70°41'48.515" West (reference National Geodetic Survey).

7. The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973. The position of this point is latitude 42°58'51.6" North and longitude 70°37'17.5" West as scaled from the above-described chart.

8. The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42°58'55" North and longitude 70°37'39.5" West. Said point has a computed bearing of 394°08'52.81" true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 30, USCG-158, whose position is latitude 42°58'01.710" North and longitude 70°37'25.590" West (reference National Geodetic Survey).

9. The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (6) and (8) above has been determined on the basis of the "special circumstances" exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U.S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two States in their colonial grants and charters.

10. The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

11. The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139°20' 27.22" true.

12. The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination point proceeds toward Piscataqua River channel termination point on a computed bearing of 319°17'25.43" true.

13. All positions in the preceding paragraphs are referred to the North American Datum of 1927.

14. The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973, filed with the Motion for Entry of Judgment by Consent.

15. The State of Maine, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree.

16. The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.